No. 3577

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MON SINGH, sometimes referred to as MAN SINGH,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

GEO. A. MCGOWAN,
550 Montgomery Street, San Francisco,
Attorney for Appellant and Petitioner.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This court decided as follows:

"Recurring to the description, it will be noted that Dovan Singh makes no reference to the snag-tooth, but does speak of the limp and 'pitmarks' on the face. The description given when previous warrant was applied for places the snag-tooth on the left side, shows the limp, but makes no reference to 'pitmarks' on the face. The man examined had a snag (or hood) tooth, located on the right side, upper jaw;

was 'pitmarked' about the face, but walked with no perceptible limp.

"The circumstances are peculiar, and how the evidence is to be reconciled is not for us to say. It is obvious that the evidence offered and admitted was competent in character, in view of the practice before an inspector of immigration, and tends in some degree to identify petitioner as the man wanted. The case is not one of total absence of competent testimony, nor one where but one conclusion may be drawn. We are impressed that the record is one for the exercise of independent judgment by the Secretary of Labor, and the court is bound by his conclusion. We are the more reconciled to this conclusion in view of the fact that since the order of deportation was issued the petitioner has admitted to the inspector that his true name is Man Singh, pronounced Mun or Mohn Singh."

Appellant petitions for a rehearing:

First:—It is not sufficient that there should be evidence which *"tends in some degree to identify the petitioner as the man wanted"*. The Supreme Court rule is that *"it must find adequate support in the evidence"*. This court has ruled that the *"best evidence"* must be presented.

Second:—It is a dangerous expedient to depart from the Transcript of Record in the ascertainment of determinating facts.

The Secretary of Labor attempts to deport this appellant out of the United States claiming that he entered without inspection by an immigration official. The appellant has denied this charge under

oath. There is no personal identification of the appellant. The evidence in the record used as the foundation for the issuance of the warrant of arrest and of the warrant of deportation was the testimony of an East Indian named Dovan Singh, that he had been smuggled into this country from Mexico. Dovan Singh was deported by the Government and sent out of the country before the arrest of this appellant. There never was a personal identification, or even an identification by photograph of this appellant by Dovan Singh. The only evidence contained in the record was a physical description given by Dovan Singh of a man whom he claims brought him into this country from Mexico. A criminal charge was made against the parties implicated, though no arrests were made. This appellant was arrested in this deportation case after Dovan Singh was deported to India.

The question at the threshold of this case is whether or not there is *an adequate showing* in the evidence that this appellant is the man whose personal description was given by Dovan Singh. If the evidence does not adequately support the contention that this appellant is the man referred to by Dovan Singh then the Government's case must fall to the ground. This honorable court has stated that the evidence *"tends in some degree to identify the petitioner as the man wanted"*, but I respectfully submit that the true test as laid down by the Supreme Court is not whether the evidence *"tends in some degree"*, but, on the contrary, is much

stronger and exacts that *"it must find adequate support in the evidence"*.

In each one of the many cases that have been before the Supreme Court testing the sufficiency of such executive action, that tribunal has laid down and enunciated different principles. The last case so decided is that of *Kwock Jan Fat v. White* (253 U. S. 454, 457-8; Sup. Ct. 566, 567-8) in which a recapitulation was made as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682, 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218."

After enunciating the foregoing principles the court concludes its opinion as follows:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily

and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration, and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

I submit that in the light of the great principles set forth by the Supreme Court it is imperative that the Secretary of Labor should have had ADEQUATE EVIDENCE to support his decision, as pointed out by this court in *Backus v. Owe Sam Goon* (235 Fed. 847-854) and *White v. Tom Yuen* (244 Fed. 739-741):

" 'As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases; but we may properly consider the jurisdictional question of law whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under section 21 of the Immigration Act. In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review.' "

In each of these two last mentioned Chinese cases there was evidence *which tended in some degree to identify the defendant* as one illegally in the United States. It was evidence given under oath before an immigration inspector prior to the hearing of the alien. In each one of those cases the trial court held, and this court approved, and further elaborated upon the legal proposition, as hereinbefore set forth. In each of these cases against the two Chinese there was the sworn statement of witnesses that they knew the Chinaman and had seen him in Mexico and identified him by photograph. In the present case the evidence is far weaker; there is no photograph presented, and there is no such personal identification. The witness in question, Dovan Singh, gave a general personal description of a man who brought him from Mexico. The two essential points of that description were set forth in a letter dated April 11, 1917, and contained on page 66 of the immigration record, from Chas. T. Connell, the inspector in charge of the Los Angeles office, to D. A. Plumley, wherein he writes as follows:

> "The alien Man Singh *walks with a limp,* on the right side of heel on right foot. The same is very noticeable when he walks."

Whereas a "confidential Hindu informant", Jo Allah, sets forth the remaining prominent distinquishing mark—

> "Prominent snag tooth on left side, upper jaw, seemingly projecting over two others."

It is, indeed, singular that these two individual distinguishing marks, and the only two which would prevent the remaining portions of the description being applicable to any adult of the Sikh class, were found to be missing in this detained, as shown by the report of the Bureau of Immigration for the Secretary of Labor at page 101 of the immigration record, where it is set forth:

> "It will be noted (pp. 8-13) that alien answers to the description of the man wanted, except that he does not now walk with a perceptible limp and his snag or hood tooth is on the right side instead of the left."

I maintain and respectfully present to the court that the *"best evidence"* rule it upheld in the cases of *Owe Sam Goon,* supra, and *Tom Yuen,* supra, is equally, if not more applicable, in the present case. In the cases of the two Chinese at least there was an identification by photograph, but this case presents not even that class of evidence. In the case at bar, as well as the cases of the two Chinese, which are referred to, there was the sworn testimony of a Government witness before an immigration officer, and in the case of the two Chinese there was an identification of what was admitted to be a photograph of the respective Chinese defendants. In the present case no photograph was used, and the only identification attempted was to ask the witness for a personal description of the alien who had brought him over. The "best evidence" rule would have exacted considerably more than was presented in

this case. The best evidence would have been the personal testimony of Dovan Singh confronting this defendant and identifying him. The Government had the means to hold Dovan Singh by indicting him in the criminal case referred to in the record, and holding him as a defendant or a detained witness. The Government also had recourse to call the "confidential" "Hindu informant" Jo Allah, but it did neither the one nor the other. Dovan Singh was shipped out of the country and sent back to India, why we do not profess to know, except that we submit that when the Government, of its own initiative, sent its best evidence out of the country, and decided to abandon the criminal prosecution, that such action, being voluntarily taken upon the part of the Government, must of necessity be construed against it, for as stated in *Backus v. Owe Sam Goon,* supra, at page 853:

> " * * * The rule of evidence in this respect is that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power. Clifton v. United States, 45 U. S. (4 How.) 242, 247, 11 L. Ed. 957. The presumption in such case is that, if the legal testimony had been produced, it would have been unfavorable, if not directly adverse, to the case. Clifton v. United States, supra."

The "confidential Hindu informant" should have been called to testify for the Government and satisfactorily establish the identity of this appellant. He was in the Government's pay in this matter and it was incumbent upon the Government to present

its best evidence. Not having done so the inference naturally follows that, if presented, the testimony would have been adverse. The excuse given by the Government for not producing the best evidence is:

> "Personal identification of alien by the officers in the vicinity of Calexico was impracticable because of the heavy expense involved. * * *"

This is the first time we have ever heard the financial yardstick advanced as an excuse and justification for departing from the best evidence rule which American justice fundamentally exacts. The executive officers did avail themselves of the confidential information of this witness, and very improperly so, as we contended. With respect to such matters this court held in *Chew Hoy Quong v. White* (249 Fed. 869, 870), as follows:

> " * * * However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

I am not unmindful of the fact that this court states "so that the petitioner's story of himself is a vacillating one". But the circumstances adverted

to by the court are not dissimilar to those involved in *Backus v. Owe Sam Goon,* supra (pages 853-54), wherein it is set forth:

> "But it is contended that, when the accused was arrested, he was unable to explain the circumstances connected with his presence in a freight car arriving at Tucson from the East. This fact may be a ground for some suspicion and possibly some conjecture as to where he came from; but mere suspicion or conjecture were not sufficient upon which to base a judgment that transfers the exclusive jurisdiction to make the inquiry from the courts of the United States to the Department of Labor."

We are here called upon to consider the jurisdictional question of law whether there was adequate evidence to call in operation the jurisdiction of the Department of Labor and upon such jurisdictional questions the court must determine whether there was adequate evidence, within the best evidence rule, to sustain it. These administrative executive hearings have been very forcefully and aptly described by the Supreme Court of the United States in *United States v. Woo Jan* (245 U. S. 552; 28 Sup. Ct. 207), wherein it is adverted to that "*mere discretion prompts the first and last act of the* * * *" administrative hearing, and that it has not "*the security of procedure and ultimate judgment of the judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanction*". The above expressions were re-affirmed in *White v. Chin Fong* (253 U. S. 90; 40 Sup. Ct. 449).

It is respectfully contended that a rehearing should be granted in this matter upon this point, for the reason that there is not adequate supporting evidence of the theory upon which this appellant is sought to be identified as the man who brought Dovan Singh into the United States, and that such evidence as is presented is inadmissible under the best evidence rule as enunciated and upheld by this court in the cases of the two Chinese persons hereinbefore referred to.

The Second Point is that it is a dangerous expedient to depart from the Transcript of Record in the ascertainment of the determinating facts. The opinion of the court concludes:

> "We are the more reconciled to this conclusion in view of the fact that since the order of deportation was issued the petitioner has admitted to the inspector that his true name is Man Singh, pronounced Mun or Mohn Singh."

This condition is brought about by the attorney for the Government incorporating in his brief several pages devoted to copies of correspondence which took place after the order of deportation was made in this matter. The appellant has never been confronted with these letters or had an opportunity to be heard with respect thereto, and it is respectfully submitted that it is grossly unfair to prejudice his rights by anything therein contained.

It seems to appellant that he should have his day in court on a matter that is entirely without the record, before it is used to deprive him of a most vital

right inherent in his residence among us. The injection of this matter into the case long after its submission to this court, by placing it in their brief, left appellant no apt or reasonable opportunity or chance to be heard in answer thereto. The establishment of such a precedent we view with alarm. It is contrary to three almost contemporaneous decisions of this very court: *Jeung Bock Hong v. White* (258 Fed. 23); *Louie Share Gan v. White* (258 Fed. 798) and *Lim Chan v. White* (262 Fed. 762). In the first case it is held, the court speaking through Circuit Judge Morrow:

> "In this case no such claim was made in the petition for the writ of habeas corpus, and no such claim was made in the court below or on the appeal to this court. It was made for the first time in the addendum to counsel's brief after the submission of the case in this court. In the absence of a record presenting the proceedings referred to, it cannot be considered on appeal."

In the last case which was decided on February 2, 1920, it is held, the court speaking through Circuit Judge Gilbert:

> "It is presented for the first time in a brief filed in this court. It cannot avail the appellant here."

Returning to this correspondence contained in respondent's brief we find first, a letter from Commissioner White to the inspector at Denver giving information as to the deportation of appellant to India and requesting information as to his passport. Next follows the answer from the immigrant

inspector at Salt Lake City. It is noted that all of the information with respect to this man is given by Inspector Plumley and not by this appellant. The occupation, the physical description and weight, and all of these things are not only supplied by the inspector but the signature attached to the bottom thereof is a tracing of the signature of Rom Singh, probably from the notes which he signed at the conclusion of his examination at the immigration hearing. It should not be accepted that this appellant has signed this application for a passport because he assured me that he never did any such thing. Following is a letter from Commissioner White giving this information to the British-Consul General, and that, in turn, is followed by a letter from the British-Consul General asking why this man was to be deported, and this was again followed by a letter from Commissioner White giving the reasons why this man was to be deported. Then followed some letters from a bank at Brawley, Imperial County, California, relative to a bank account.

Now all these matters are not a confession or a declaration against interest by this appellant. At no time, and at no place, have we been pointed to an admission by him that he was the man who brought Dovan Singh from Mexico into the United States, and that is the one determinating and determinative issue in this case. As pointed out in our brief in this matter the word "Singh" is simply an appellation added to the name of every East Indian who belongs to the "Sikh" religious sect; in no

sense is it used as a means of personal identification other than to describe the man as being a Sikh instead of a Mohammedan or a Hindu. For Dovan Singh to have said that a person by the name of Man conducted him across the Mexican border is no more than to say that a person by the name of George, or Harry, or Jim, or Gus, or Frank, brought him across the border.

By far the great majority of East Indian residents in this country are members of the Sikh sect. We have thousands of them in our midst and many of them go by the name of Mon or Man or Mohan. We reiterate what we formerly stated that there is no adequate identification under the best evidence rule of this appellant as the Man referred to in the testimony of Dovan Singh.

Identity of person from identity of name does not follow in such a case as is here presented. In *Bun Chew* (220 Fed. 387) it is was held at page 389:

> "* * *, even if the photograph of the individual thus exhibited was that of a Bun Chew, such individual was the same Bun Chew as is now by the Department of Labor sought to be deported to China. *It is common knowledge that many different Chinese are known by the very same name; therefore, in my judgment, there can be in an* instance of this sort no presumption of identity of person because *if identity of name.*" (Italics volunteered.)

In finally submitting this petition for rehearing I do so in the firm belief that an injustice has been

done this appellant. The best evidence rule would have required a production of direct evidence as to identity. The action of the Government in sending the best witness out of the country so that he could not be here to testify and then to advance the excuse that

> " * * * Personal identification of alien by the officers in the vicinity of Calexico was impracticable because of the heavy expense involved * * * ",

seems to deprive this alien of any semblance of defending himself against his accusers. It is noted that the "Hindu informant" Jo Allah is not a Sikh, but of a different religious sect, and the quarrels and differences and bickerings between these different East Indian sects are too notorious to pass unnoticed, as notice the murder of the Hindu Ram Chandra in the courtroom by the Sikh Ram Singh at the conclusion of the Hindu Conspiracy Case in this city some years ago.

The mention of *"heavy expense involved"* seems rather misleading when we look at the letter contained in pages 18, 19 and 20 of respondent's brief. Certainly if the Government had presented witnesses of this kind who would have been subject to cross-examination by this appellant's attorneys with the opportunity of a proper counter-showing would have enabled him to demonstrate his innocence of the charge brought against him. This appellant may be only an humble rice farmer, but his right of residence in the United States is a very precious thing to him; in fact, his whole soul and existence.

It is hoped that the court will respectfully grant his petition for a rehearing.

Dated, San Francisco,
September 7, 1921.

Respectfully submitted,

Geo. A. McGowan,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 7, 1921.

Geo. A. McGowan,
Of Counsel for Appellant and Petitioner.